No. 87-282

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

SOUTH BEND COMMUNITY SCHOOL CORPORATION

Petitioner,

v.

ELMER BRITTON, et al.,

Respondents.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Petitioners,

v.

JULIE ANDREWS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD J. LASALVIA
DONALD E. WERTHEIMER
Suite 811, JMS Building
South Bend, Indiana 46601
(219) 234-6066

DANIEL H. PFEIFER
SWEENEY, PFEIFER AND BLACKBURN
53600 North Ironwood Drive
South Bend, Indiana 46635
(219) 272-2870

DANIEL H. PFEIFER
RICHARD J. LASALVIA
DONALD E. WERTHEIMER
Counsel of Record

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTIONS PRESENTED FOR REVIEW

1. Whether a provision in a public school district collective bargaining agreement which provides that no black teachers shall be laid off, only white teachers, violates the fourteenth amendment because it is not narrowly tailored to achieve a compelling state purpose, inasmuch as the provision is too intrusive and burdensome upon the white teachers.

2. Whether a provision in a public school district collective bargaining agreement which provides that no black teachers shall be laid off, only white teachers, which was designed to safeguard the school district's hiring goal of raising the percentage of black teachers to approximate the percentage of black students violates the Fourteenth Amendment because it is not narrowly tailored to achieve a compelling state interest inasmuch as the layoff provision is keyed to a hiring goal that has no relation to remedying employment discrimination.

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OPINION BELOW

Respondents adopt the statement of the Opinion Below set out in the Petition for Writ of Certiorari.

JURISDICTION

Respondents adopt the statement of this Court's Jurisdiction set out in the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the statement of the Constitutional and Statutory Provisions Involved set out in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In the spring of 1982, the South Bend Community School Corporation (herein after referred to as "SBCSC") laid off 146 teachers. All teachers laid off were white. Of the total number of teachers laid off, 48 had more seniority than black teachers not laid off.

No black teachers were laid off because of Article XXIII, Sec. 9 of a Collective Bargaining Agreement (hereinafter referred to as "CBA") negotiated between SBCSC and the National Education Association of South Bend (herein after referred to as "NEA"), the designated union representative for the teachers. Article XXIII, Sec. 9 of the agreement provides as follows: "No minority bargaining unit employee shall be laid off." (Def. Ex. B).

SBCSC, in its negotiation with NEA, proposed Article XXIII, Sec. 9 to protect the "progress" that had been made in hiring black teachers toward the goal of equating the percentage of minority representation on the teaching staff to the percentage of minority students within the school population (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, pp. 105-106).

When the Collective Bargaining Agreement containing Article XXIII, Sec. 9 was ratified (1980-1983 Collective Bargaining Agreement), only teachers who were members of the NEA were allowed to participate in the ratification

vote. Many of the teachers laid off are not members of NEA but are members of the American Federation of Teachers Union. Additionally, the exact language of Article XXIII, Sec. 9 was not presented to the teachers at the time of ratification (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, pp. 85-86).

Laid off teachers brought suit against SBCSC alleging that Article XXIII, Sec. 9 of the Collective Bargaining Agreement violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; 42 U.S.C. Sec. 1983; 42 U.S.C. Sec. 2000, *et seq.;* and I.C. 20-6.1-4-1 *et seq.*

II. STATEMENT OF THE FACTS

On December 18, 1978, prior to the adoption of Article XXIII, Sec. 9 of the 1980-1983 Collective Bargaining Agreement, SBCSC adopted a resolution (herein after referred to "Resolution 1020") which amounted to an affirmative action plan to increase the number of minority teachers employed in the school corporation. This plan was to remain in effect until the percentage of minority teachers equaled the percentage of minority students within the school corporation (Def. Ex. D).

At the time SBCSC was considering the adoption of Resolution 1020, the school board heard testimony from the director of personnel who assured the board that the corporation was actively recruiting minority teachers. He further stated that over a two year period, out of 1300-1400 applicants for teaching positions, only 50-70 were black (Def. Ex. K-3). This isolated statement is the only evidence in the record as to the availability of black teachers for continued implementation of Resolution 1020.

After Resolution 1020 was passed, the school corporation in the 1978-1979 and 1979-1980 school years recruited and hired 62 black teachers out of the 161 teachers who were hired for that period (Def. Ex. E-2, B). The

percentage of black teachers in the teaching force increased from 10.42% in the 1978-1979 school year to 13.0% in the 1981-1982 school year (Def. Ex. E-1).

In 1980 the United States Department of Justice filed a complaint against SBCSC alleging that it had engaged in racial segregation of students and faculty. In response to that complaint, on February 8, 1980, a consent decree was issued by the United States District Court for the Northern District of Indiana, South Bend Division. In that consent decree, the school corporation specifically denied engaging in any acts of racial discrimination. Additionally, SBCSC agreed to continue its affirmative action hiring policies consistent with Resolution 1020. The consent decree was silent on the issue of layoffs, and there was no finding within the consent decree of discrimination in the hiring practices of SBCSC. The rest of the consent decree was the formulation of a desegregation plan for student and faculty assignments.

In 1976, the regional director of the Office of Civil Rights corresponded with the superintendent of SBCSC. In this correspondence (Def. Ex. M-6) the regional director states that he was concerned with the discrepancy in the percentage of black teachers and the percentage of black students within the school system. However, at no time did the regional director accuse SBCSC of employment discrimination. The school superintendent, in his reply to the director, stated that SBCSC was continuing in its efforts to recruit minority teachers (Def. Ex. M-5).

No finding of employment discrimination has ever been made against the school corporation. The Justice Department litigation focused upon segregation of black and white teachers and students. The actions of the regional director of the Office of Civil Rights in corresponding with the superintendent of SBCSC can not be considered a finding of discrimination. No action has ever been taken by the Equal Employment Opportunity Commission

alleging any type of race discrimination in the hiring practices of SBCSC.

With this background, and following the adoption of the 1980-1983 Collective Bargaining Agreement which contained Article XXIII, Sec. 9, the layoff which is the subject matter of this litigation occurred. 41 of the teachers are Respondents in this case. Of the 41 Respondents, 15 were recalled to their teaching positions for the 1982-1983 school year. Of the 26 teachers not recalled, 13 would have sufficient seniority to withstand the massive layoff had the layoffs been determined on strictly seniority. Thus, those 13 teachers were directly affected by Article XXIII, Sec. 9.

The 1980 - 1983 Collective Bargaining Agreement also contains a provision which allows for laid off teachers to be given an opportunity to work as substitute teachers (Article XXIII, Sec. 8). While on the face of it Article XXIII, Sec. 8 appears to temper the impact of Article XXIII, Sec. 9, closer scrutiny reveals that restoration to substitute teaching positions does not fully protect the laid off teachers. The provision is not an adequate substitute for the loss of the full-time teaching positions and fringe benefits related thereto. For example, substitute teachers are not entitled to receive life insurance benefits, health insurance benefits, retirement benefits or sick days. (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60). Additionally, if a substitute teacher does not teach at least 120 days of the school year (one half of the school year) that teacher does not receive seniority for that year. (Def. Ex. B). Seniority is important to teachers within the SBCSC as it is used to calculate the base salary for teachers. Furthermore, if there is break in service tenure status can be lost. Tenure is significant inasmuch as it statutorily dictates the standard to be applied by a school corporation in the event a teacher is to be terminated (I. C. 20-6. 1-4-1). Finally, some of the teachers laid off were coaches within SBCSC. Substitute teachers are not entitled to coaching

positions within the school corporation. Thus the benefits of coaching, along with the salaries paid for coaches, were also lost. (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60).

III. PROCEEDINGS BELOW

The District Court held a two day bench trial where most, if not all, of the documentary evidence was stipulated into evidence (Trial Transcript pp. 5-6, 14). The District Court found the no-minority layoff provision to be constitutional under the Fourteenth Amendment and dismissed the pendant state claims without prejudice. 593. F. Supp. 1223 (N. D. Ind. 1984).

The District Court held that the no-minority layoff provision was designed to do nothing more than prevent the loss in hiring gains which had been achieved since the SBCSC Board resolved, through Resolution 1020, to increase the percentage of its black teacher. *Id.* at 1225. The District Court also found that, "at no time were findings made that the school corporation had engaged in intentional discrimination against any black applicant or teacher." *Id.* at 1226.

The School corporation appealed. A divided panel of the Court of Appeals for the Seventh Circuit affirmed.

On May 18, 1987 the *in banc* Court of Appeals reversed the District Court and remanded the case to the District Court to determine the relief the plaintiffs are entitled.

The Court of Appeals based its ruling on *Wygant v. Jackson Board of Education*, 476 U. S. ___, 106 S. Ct. 1842 (1986), holding that the no-minority layoff provision in this case is even less narrowly tailored than the proportional layoff provision in *Wygant* and therefore unconstitutional under the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I. Summary of Reasons

The Petitioner asserts three reasons why this Court should grant Certiorari. The Respondent respectfully suggests none provide appropriate grounds for granting of the Writ.

First, the Petitioner suggests this Court has expressly reserved decision on whether or not enhancing the quality of education for all students by providing a racially diverse faculty is sufficiently compelling to warrant affirmative action. Respondents maintain that whether or not the interest in providing a racially diverse faculty is sufficiently compelling becomes secondary if the means by which the interests are promoted are unconstitutional.

In *Wygant v. Jackson Board of Education* 476 U.S. ___, 106 S. Ct. 1842 (1986) this Court held that perhaps such an interest could be a compelling purpose, but the layoff provision instituted was not "sufficiently narrowly" tailored to withstand constitutional inquiry. Likewise, Article XXIII Sec. 9 being more intrusive than the plan in *Wygant*, cannot be held "sufficiently narrowly" tailored.

Second, the Petitioner asserts that there is an urgent need for additional guidance from this Court on the permissible limits of affirmative action during layoff times. This Court succinctly addressed that issue in *Wygant*. The affirmative action plan in *Wygant* was held unconstitutional because the plan was not narrowly tailored. The plurality stated other less intrusive means of accomplishing similar purposes were available.

In addition to *Wygant*, this Court in *United States v. Paradise*, 48 U.S. ___,107 S.Ct. 1053 (1987) and *Johnson v. Transportation Agency*, Santa Clara, California, ___ U.S. ___, 107 S. Ct. 1442 (1987), throughout the holdings and dissents, addressed the issue of layoffs. This Court has provided substantial guidance to the lower courts as to its position on layoffs. Although a flexible,

short term layoff plan with waiver provisions could present a questionable issue, clearly, this Court has addressed the issue of a one-hundred percent layoff protection provision such as Article XXIII, Sec. 9.

Finally, the Petitioner asserts that the "per se analysis" employed by both the plurality and concurring opinions below is inconsistent in approach with the numerous decisions of this Court. The Respondent respectfully suggests that the decision below was controlled by *Wygant v. Jackson Board of Education*. The fact patterns of the two cases are nearly identical, but for the fact that Article XXIII, Sec. 9 is a 100% layoff provision while Article XII, the layoff provision in *Wygant*, is not a 100% layoff provision. The Seventh Circuit correctly followed the precedent established by *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986).

II. THE DECISION BELOW HOLDING THE SCHOOL CORPORATION'S AFFIRMATIVE ACTION LAYOFF PROVISION UNCONSTITUTIONAL IS CONSISTENT WITH RECENT SUPREME COURT DECISIONS

The Seventh Circuit based its holding upon *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986) decided in the interim between the Seventh Circuit's panel decision and the rehearing *in banc*.

The Petition for Writ of Certiorari should be denied because not only is it consistent with the holding in *Wygant*, the facts in the present case exceed the parameters set forth by the plurality in such a manner that the Justice's writing dissenting opinions in *Wygant* would also oppose this layoff provision.

The petitioner asserts in its brief that this Court recently decided two additional cases dispositive of this case. The Respondents respectfully suggest that of the two, *United States v. Paradise* 48 U.S. ___, 107 S. Ct. 1053 (1987) and *Johnson v. Transportation Agency, Santa Clara,*

California, ___ U.S. ___, 107 S. Ct. 1442 (1987), only *Paradise* is relevant, and then only to exemplify what this case is not.

The petitioner further attempts to suggest that the Seventh Circuit was inconsistent in its approach. The Respondents assert *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986), *United States v. Paradise*, 48 U.S. ___, 107 S. Ct. 1053 (1987) and *Johnson v. Transportation Agency, Santa Clara, California*, ___ U.S. ___, 107 S. Ct. 1442 (1987) are distinguishable on their facts, and therefore consistent in as far as their holdings, all of which support the holding below.

All of the recent decisions of this Court acknowledge a hesitancy to make bright-line distinctions in this difficult area of affirmative action. The appropriate standard to measure the constitutionality of state actors' efforts to attain and maintain remedial plans has varied from the highest level of review, strict scrutiny, requiring a compelling state purpose that is narrowly tailored, to the lowest level of review, a balancing of factors to determine if the remedy is appropriate. Article XXIII Sec. 9 of the Collective Bargaining Agreement, cannot pass constitutional muster regardless of the standard the Court adopts. The following analysis of *Wygant v. Jackson Board of Education, United States v. Paradise, Johnson v. Transportation Agency*, and cases cited therein will confirm its unconstitutionality.

A. THE DECISION BELOW IS CONSISTENT WITH *WYGANT V. JACKSON BOARD OF EDUCATION*

In *Wygant*, the Collective Bargaining Agreement (CBA) provided that if teacher layoffs were necessary, those teachers with seniority would be retained, however, at no time would a greater percentage of minority personnel be laid off than the current percentage of minority personnel employed at the time of the layoff. Further,

the number given notice of possible layoff would never be greater than the number of positions to be eliminated. *Wygant*, 476 U.S. at ___, 106 S. Ct. at 1845.

This court granted Certiorari to resolve the important issue of the constitutionality of race based layoffs by public employers, and held the Jackson School Board's plan unconstitutional. Because the facts in *Wygant* and the present case so closely parallel each other, *Wygant* is controlling.

Justice Powell, writing for the plurality and citing to a long line of cases beginning with *Shelley v. Kramer* 334 U.S.1, 22 (1948), noted, " the court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1846. (citations omitted).

Because racial and ethnic distinctions of any sort are inherently suspect they call for the most exacting examination, which traditionally has been strict scrutiny, and *Wygant* was analyzed and decided via the two prongs of the that standard; first, any racial classification must be justified by a "compelling governmental interest", second, the means must be "narrowly tailored." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1846.

In *Wygant* the school board had asserted the providing of role models for minority students as the basis for its "compelling purpose" to alleviate the effects of societal discrimination. Significantly, both lower courts in *Wygant* concluded "any statistical disparities were the result of general societal discrimination, not prior discrimination by the board". *Wygant*, 476 U.S. ___, 106 S. Ct. at 1849. The board contended that given a second chance, on remand, it could establish and prove prior discrimination. This Court concluded that the argument was belated, and further that it was in essence moot because "the layoff provision was

not a legally appropriate means of achieving even a compelling purpose." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1849.

The SBCSC below asserted the role model theory, and then at the rehearing *in banc* attempted to expand its earlier position to include prior discrimination in an effort to overcome the mistake of having focused on the role model theory, following the outcome in *Wygant*. However, the record below reflects that rather than discriminating against black teachers, the SBCSC had been hiring increasing numbers of black teachers since 1972 when twenty-two percent of all new hirees were black. App. at p. 12a. This Court held the Board's prior discrimination argument in *Wygant* "belated" and should in this case as well.

Justice O'Connor concurring with Justice Powell's plurality decision, stated:

> In this case, the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool. The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment.

Wygant, 476 U.S. ___, 106 S. Ct. at 1857.

While the *Wygant* plurality stated providing role models may or may not be a compelling purpose, "the layoff provision was not a legally appropriate means of achieving even a compelling purpose." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1849, and, therefore, the demands of the Equal Protection Clause were not met. Likewise, in the present case, the role model theory was asserted at the District

Court level. When this matter came before the Seventh Circuit, sitting *in banc*, the petitioners attempted to direct the thrust of their argument to an alleged history of discrimination that was never determined below, and in fact is unsupported by the record.

In *Wygant*, Justices Powell, Burger, and Renquist held the layoff provision was not narrowly tailored, although it preserved seniority, while, at the same time, limiting the number of blacks laid off to the percentage of blacks within the ranks of employees thereby lessening the impact on non-minority employees. The plan in the present case goes further. It completely protects blacks from layoffs. As Justice White noted in his concurring opinion:

> Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter. *Wygant*, 476 U.S. ___, 106 S. Ct. at 1857 (White, J. Concurring).

Recognizing that to achieve eradication of racial discrimination, innocent persons may be called upon to share the burden, this Court nevertheless rejected the plan in *Wygant*. Citing to *Firefighters v. Stotts*, 467 U.S. 561 (1984) and *Steelworkers v. Weber* 443 U.S. 193, 208 (1979), this court again expressed concern over the burden preferential layoffs impose upon innocent parties. Layoffs impose a greater injury.

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. The burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the board's layoff plan is not sufficiently narrowly tailored. *Wygant*, 476 U.S. ___, 106 S. Ct. at 1851.

This Court's utilization of the term "diffuse burden" has become important in recent holdings. Looking to the factor of "diffuse burden" upon which this court has recently placed great weight, it is significant to note that Justice Marshall in his dissenting opinion in *Wygant* (joined by Brennan and Blackmun) felt that the allocation of the burden between blacks and whites was sufficient to diffuse the burden and therefore bring the plan within constitutional boundaries.

However, Justice Marshall addressed the possibility of a provision like Article XXIII Sec. 9:

> Another possible approach would have been a freeze on layoffs of the minority teachers. This measure, too, would have been substantially more burdensome than Article XII, not only by necessitating the layoff of a greater number of white teachers, but also by erecting an absolute distinction between the races, one to be benefitted, and one to be burdened, in a way that Article XII avoids. *Wygant* 476 U.S. ___, 106 S. Ct. at 1865.

This hypothetical approach creating an absolute ban on minority layoffs, so aptly posited by Justice Marshall, is precisely what Article XXIII, Sec. 9 does. It contains none of the narrow tailoring required by the majority in *Wygant*, and most certainly diffuses none of the burden on non-minority teachers. Regardless of the standard applied, the elevated level of scrutiny applied by the plurality and Justice O'Connor, or the more relaxed balancing standard favored by Justices Marshall, Brennan, Blackmun, and Stevens, Article XXIII is unconstitutional, because it exceeds even the tolerable burden posited by Justice Marshall and other dissenting Justices in *Wygant*. The holding below is consistent with *Wygant*.

B. THE DECISION BELOW IS CONSISTENT WITH *UNITED STATES V. PARADISE*

In *Paradise*, this court was asked to decide the constitutionality of court ordered relief applied as an interim measure to state trooper promotions within the Alabama Department of Public Safety. Although *Paradise* addresses the issue of promotions not layoffs, it is instructive for the lower courts in its analysis of the tolerable limits of affirmative action plans.

Justices Brennan, Marshall, Blackmun, and Powell upheld the court ordered relief which enjoined the department to hire one black for one white trooper until twenty-five percent of the force was black, and which ordered that for a period of time, fifty percent of the troopers promoted to Corporal be black, if there were qualified black candidates, if the rank was less than twenty-five percent black and if the department did not have a plan of its own.

Most notable is the finding of the court that in thirty-seven years there had never been a black trooper at any rank. In addition, the decrees were entered by the District Court only after the Department's repeated failure to produce its own plan. The plurality noted racial classifications to remedy unlawful treatment can be constitutional, and to make that determination some elevated level of scrutiny is required to review such classifications. However, defining that level was not deemed necessary because the relief would survive even strict scrutiny inasmuch as it was "narrowly tailored" to serve a "compelling government purpose". *Paradise*, 480 U.S. ___, 107 S. Ct. at 1064. Applying the *Paradise* balancing factors, this Court should affirm the Seventh Circuit's determination that Article XXIII Sec. 9 is unconstitutional because it cannot survive even the most undemanding of all standards, the balancing of factors utilized by this court in *United States v. Paradise*, 480 U.S. ___, 107 S. Ct. at 1067.

Before turning to those factors, it is vital to distinguish the facts in *Paradise* from the present case. Of utmost importance, the classification in *Paradise* addressed hiring and promotions, not layoffs involving one hundred percent protection of blacks. Furthermore, this Court addressed the thirty-seven year history of no black troopers at any rank, and cited to the District Court determination that the Department had engaged in a "blatant and continuous pattern and practice of discrimination in hiring." *Paradise* 480 U.S. ___, 107 S. Ct. at 1058.

In both *Wygant* and the present case, there was no lower court determination of such a pattern and practice. In fact, as Judge Posner pointed out, in 1978 black teachers constituted ten percent of the teaching staff, while black students constituted twenty-two percent of the student body. By 1981, 13.03% of the teachers were black while 25% of the students were. App. at P.13a.

These numbers most clearly do not represent a pattern and practice of anything but a trend to increase the number of black teachers. As Justice Scalia so aptly noted in *Johnson v. Transportation Agency, Santa Clara, California*, ___ U.S. ___, 107 S. Ct. 1442 (1987), referring to the goal of the agency to have its work force mirror the composition of the available labor force:

> In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of even that portion of a county work force qualified for that job; it would be utterly miraculous for each of them to match as the plan expected, the composition of the entire work force. *Johnson*, ___ U.S. ___, 107 S. Ct. at 1467.

The numbers of black teachers within SBCSC had been increasing, and there was no history of discrimination established to justify the radical race conscious relief the one-hundred percent layoff protection provision provided, nor any labor market statistics to substantiate a discriminatory disparity.

In *Paradise* this Court held the "race conscious relief at issue here is justified by a compelling interest in remedying the discrimination that permeated entry level hiring practices and the promotional process alike." *Paradise* 480 U.S. ___, 107 S. Ct. at 1066. The Court, therefore, found the relief imposed constituted a "compelling interest". While not using strict scrutiny as the standard to measure the constitutionality of the remedy, the Court looked to several factors that, taken together, would nonetheless satisfy the "narrowly tailored" prong of the strict scrutiny test. Those factors are:

1. Necessity for relief and efficacy of alternative remedies.
2. Flexibility and duration of the relief, including availability of waiver provisions.
3. The relationship of numerical goals to the relevant labor market.
4. The impact of the relief on the rights on third parties.

Paradise, 480 U.S. ___, 107 S. Ct. at 1067.

The limited, flexible, short term, one-for-one promotion order in *Paradise* met these requirements. Since no blacks were on the force, the need for relief was unquestionable. The plan was flexible at all ranks. It applied only to promotions. The decree was intended as a stopgap measure imposed by the court as hopefully a "one time occurrence". And the one-for-one requirement was to be in effect only until twenty-five percent of the rank in question was black, if the order indeed had to remain in effect.

Finally, the one-for-one requirement did not impose an unacceptable burden on innocent third parties because it was a temporary measure and was not a "absolute bar" to white advancement. In citing to *Wygant*, Justice Brennan noted:

> The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*, 476 U.S. ___, 106 S. Ct. at 1851 (opinion of Powell, J.) (layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives) i.d., at ___, 106 S. Ct. at 1857 (White, J., concurring) (same). Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotion of qualified whites. Consequently, like a hiring goal, it "impose[s] a diffuse burden. . . foreclosing only one of several opportunities." I.d., at ___, 106 S. Ct. at 1851. "Denial of a future employment opportunity is not as intrusive as loss of an existing job," *Wygant* 476 U.S. at ___, 106 S. Ct. at 1851 (opinion of Powell, J.) and plainly postponement imposes a lesser burden still. *Paradise* 480 U.S. ___, 107 S. Ct., at 1073.

Justice Powell also distinguished the promotion scheme from layoffs:

> Finally, and particularly important, the effect of the order on innocent white troopers is likely to be relatively diffuse. Unlike layoff requirements, the promotion requirement at issue in this case does not "impose the entire burden of achieving racial equality on particular individuals," . . . *Paradise*, 480 U.S. ___, 107 S. Ct., at 1076.

The plan in the present case is everything the plan in *Paradise* was not. The following analysis of the present case in light of these factors shows Article XXIII cannot withstand even the consideration of these factors.

1. NECESSITY FOR RELIEF AND EFFICACY OF ALTERNATIVE REMEDIES

In *Wygant*, the role model theory was soundly rejected by this Court, and this Court has sought more intrusive patterns of discrimination as the backdrop against which it has upheld remedial measures in subsequent cases.

The goal advanced by SBCSC in the District Court was to correct a discrepancy between the percentage of black students and white teachers. Justice O'Connor, in *Wygant*, asserted that a discrepancy between the percentage of teachers and students was not probative of employment discrimination, and that the proper comparison would have been between the percentage of qualified black teaching applicants hired, and qualified white teaching applicants hired. *Wygant* 476 U.S. ___, 106 S. Ct. at 1857.

The Trial Transcript and Exhibits in the present case do not reflect a purpose on the part of the South Bend School Board to remedy employment discrimination. Therefore, the necessity for relief as required by this court is lacking. The focus of the School Board below was on complying with the then apparently appropriate "role model" theory. To permit the Petitioner now to assert otherwise would be to say that each time a case presents itself to this Court for review, and a preceding decision by this Court changes the focus of the petitioner's position below, the petitioner should be given another opportunity to relitigate in light of the more recent decision.

Assuming that the necessity for relief could be extracted from the record below, most certainly there is no indication that the school board considered the efficacy of alternative remedies, since the most drastic remedy was adopted with no substantiation for the potential failure of a less intrusive one.

2. FLEXIBILITY AND DURATION OF THE RELIEF, INCLUDING AVAILABILITY AND WAIVER PROVISIONS

The flexibility and limited duration in *Paradise* simply does not exist within Article XXIII, Sec 9. There is no flexibility in a one-hundred percent layoff protection plan that for three years allots to the black teachers a "superseniority" with no availability of any waiver provision. In essence, all recently hired black teachers are protected

from layoffs. Non-minority teachers with more seniority suffer the effects of a layoff to protect the gains achieved by the plan. Article XXIII was imposed against a backdrop totally lacking the pattern and practice of discrimination this Court has found so important in its recent holdings, namely *United States v. Paradise* and *Johnson v. Transportation Agency.*

Article XXIII, Sec. 9 on its face appears to provide some flexibility via substitute teaching provisions. However, even with the recall provision, teachers substitute teaching lose life insurance, health insurance, retirement benefits and sick days. (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60). Further, if a substitute teacher does not teach at least 120 school days, that teacher loses a year of seniority. In addition, many of the laid off teachers were coaches. The substitute positions did not allow them to continue coaching (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60).

3. THE RELATIONSHIP OF NUMERICAL GOALS TO THE RELEVANT LABOR MARKET

The relationship of numerical goals to the relevant labor market is precisely the factor that Justice O'Connor would find lacking in Article XXIII, Sec. 9. In the present case, the goals were not tied to the relevant labor market. In fact, the School Board was seeking only to equate the fraction of black teachers to the fraction of black students. There was no reference in the record below to an attempt to correlate the number of black teachers to the local labor market. In fact, the only evidence in the record is that over a two-year period, out of 1300-1400 applicants, only 50-75 were black. (Def. Ex. K-3) This Court has soundly rejected the imposition of numerical goals absent something more. The existence of this very list of factors supports that statement.

4. THE IMPACT OF THE RELIEF ON THE RIGHTS OF THIRD PARTIES

This court in *Paradise* specifically noted, as has been previously cited herein, that the impact of the relief on the rights of third parties is a significant consideration. Because of the nature of the remedy in the present case, the rights of third parties have been significantly and unquestionably trammeled. As Justice Powell commented in his concurring opinion in *Paradise*:

> Finally and particularly important, the effect on innocent white troopers is likely to be diffuse. Unlike layoff requirements, the promotion requirement at issue in this case does not "impose the entire burden on achieving racial equality on particular individuals," and does not disrupt seriously the lives of innocent individuals.

United States v. Paradise 480 U.S. ___, 107 S. Ct. at 1076 (Powell, J. concurring). There is no diffusion of the burden in the present case.

The present case does not present a question regarding promotions. It presents a question regarding the constitutionality of a 100% layoff protection provision for minorities within the South Bend Community School Corporation's Collective Bargaining Agreement. The present case does not come before this Court with a history of a "blatant, continuous pattern and practice of discrimination." Article XXIII, Sec. 9 does not present a plan that is flexible. The super-seniority afforded to recently hired minority teachers is a 100% protection plan, for three (3) years. Article XXIII, Sec. 9 does not demonstrate goals tied to the relevant labor market. The plan is tied to an improper hiring goal, that of equating the fraction of black teachers to the fraction of black students. App. at p. 14 a. Article XXIII, Sec. 9 does not "diffuse the burden". Particular individuals have to bear the entire burden.

Not only does the plan in the present case fail the strict scrutiny standard applied by this Court in *Wygant*,

Article XXIII, Sec. 9 also does not meet any of the factors taken into consideration by this Court in *United States v. Paradise*. Simply put, this Court would have to overrule *Paradise* to uphold Article XXIII, Sec. 9.

III. THE COURT OF APPEALS PROPERLY REFUSED TO REMAND

The Petitioners assert that the Seventh Circuit should have remanded this case to the District Court for further fact finding. However, all the facts in this case were before the District Court, including the reasons for the school corporation proposing the no-minority lay-off plan and the burden imposed on the white teachers by the layoffs. Most, if not all, of the documentary evidence before the District Court was stipulated into evidence.

The District Court found that the school corporation's use of the no-minority layoff clause was a reasonable means of increasing the percentage of black teachers in the school system until it equalled the percentage of black students so that the students would have a sufficient number of minority teachers to act as role models. 593 F. Supp. 1223, 1225 (N.D. Ind. 1984).

The petitioners argued to the Seventh Circuit that the District Court's findings provided sufficient justification for the use by the school corporation of the no-minority layoff provision. They now assert that the Seventh Circuit should have remanded this case to the District Court because the District Court's findings were not sufficient on the issue of whether the school district's interest in providing a racially diverse faculty could justify the no-minority layoff provision. This is precisely what the district court considered in its judgment that the no-minority layoff clause was constitutional.

The issue of whether the findings of the district court were clearly erroneous was not before the Seventh Circuit since neither the petitioners nor the respondents ever raised that issue on appeal. The Seventh Circuit, therefore,

did not need to address this issue in its ruling, because based on the findings of the district court, the no minority layoff provision was not narrowly tailored to achieve even a compelling purpose under the fourteenth amendment. Remand, would, therefore, serve no purpose in this case, except further delay in a case where a number of teachers laid off in 1982 have never, as of this late date, been recalled.

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) this Court held that remand is not necessary in cases such as this where there has been an erroneous view of the law if " the record presents only one resolution of the factual issue." 456 U.S. at 292. It is clear under *Wygant* that the no-minority layoff clause is unconstitutional.

There are no facts that were not before the District Court that would save this no-minority layoff provision from being declared unconstitutional.

CONCLUSION

The decision below is not in conflict with the decisions of this Court or any Court of Appeals. The Seventh Circuit Court of Appeals properly held that the no-minority lay-off provision was unconstitutional under the Fourteenth Amendment and properly remanded the case to the District Court to determine the relief the respondents are entitled. For the foregoing reasons, respondents respectfully submit that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD J. LASALVIA
DONALD E. WERTHEIMER
Suite 811, JMS Building
South Bend, Indiana 46601
(219) 234-6066

DANIEL H. PFEIFER
SWEENEY, PFEIFER AND BLACKBURN
53600 North Ironwood Drive
South Bend, Indiana 46635
(219) 272-2870

DANIEL H. PFEIFER
RICHARD J. LASALVIA
DONALD E. WERTHEIMER
Counsel of Record